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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket No. 92-297

COMMENTS OF HYPERION COMMUNICATIONS LONG HAUL, L.P.

Hyperion Communications Long Haul, L.P. ("Hyperion"), provides these comments in response to the Commission's Sixth Notice of Proposed Rule Making[1] in the captioned proceeding, and urges the Commission not to extend the June 30, 2000 sunset date for the LMDS/cable television eligibility restriction. Extension of the restriction will not promote any policy objective of the Commission, although it will undermine the efforts of companies like Hyperion to compete in the telephony and data markets against incumbent local exchange carriers and CLECs alike. The Commission's speculation that extending the restriction might promote the emergence of another broadband data competitor to cable television operators provides no basis for an extension. The premise itself is flawed and inconsistent with numerous other Commission findings regarding broadband competition. The Commission should allow the marketplace to freely develop by permitting the sunset on the cable portion of the eligibility rule to take effect as now scheduled.

I. Backgound

Hyperion is a Delaware limited partnership whose controlling principal is Adelphia Business Solutions ("ABS"), a publicly traded company that provides facilities based competitive local exchange carrier ("CLEC") services in 75 markets in the United States. ABS is controlled by Adelphia Communications

[1] Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules, CC Docket No. 92-297, Sixth Notice of Proposed Rule Making, released December 13, 1999 ("NPRM").

Corporation ("Adelphia"), a publicly traded company that provides cable television services to approximately five million subscribers in the United States. As a result, both Hyperion and ABS are subject to the LMDS/cable television eligibility restriction.[2]

ABS is one of the nation's pioneers in providing CLEC service, having commenced operations in 1991.[3] Today ABS serves business, governmental and educational end users and other telecommunications service providers in its 75 markets with local switch dial tone, long distance service, high-speed data, and Internet connectivity. ABS currently operates numerous Lucent 5ESS switches and a 16,000 mile fiber based backbone. The CLEC network and operations will be expanded nationwide to over 200 markets within two years.

ABS' business plan involves developing a variety of mediums to deliver last-mile connectivity to customers, including fiber-line, *fixed wireless [LMDS],* and Digital Subscriber Line technologies. This variety of broadband options is important to satisfy diverse customer requirements and local conditions. As ABS explained in its most recent 10-K filing with the SEC, LMDS is "highly complementary to our fiber-based systems as an economical means to provide 'last-mile' connectivity for customers that otherwise could not be economically addressed with broadband wireline connectivity."[4]

Hyperion currently holds 193 LMDS authorizations eight of which are A block. However, access to the A block spectrum by ABS is currently restricted in markets where Adelphia Communications owns cable television systems. Adelphia's franchise areas are located nationwide many of which are or will be served by ABS' CLEC services. The unavailability of A block spectrum in these markets places Hyperion

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2 The LMDS/cable eligibility rule provides that no "incumbent cable company" can have an "attributable interest" in any A Block LMDS authorization where there is a "significant overlap" of the LMDS BTA with the franchised service area of the cable operator. Section 101.1003(a).

3 ABS was known as Hyperion Telecommunications, Inc. until a name change in October, 1999.

4 Hyperion Telecommunications, Inc. 1998 10-K at p. 6. Other major CLEC competitors are pursuing this strategy. NextLink, for example, after its acquisition of LMDS assets from WNP Communications, holds more LMDS spectrum than any other licensee, about 95% of the top 30 markets. *NextLink Inks Wireless License Deals*, REUTERS, January 14, 1999. AT&T is now integrating fixed wireless spectrum into its local service plans. *See AT&T Meets Analysts, Wall Street Journal* at A3, December 7, 1999.

and ABS at a competitive disadvantage with respect to incumbent LECs that already have access to customers, and also to other CLECs that can use an optimum mix of wired and wireless facilities to overcome the last mile problem.[5] Allowing the cable eligibility rule to sunset would eliminate these competitive disparities.

II. Events Have Proven The Rationale For The Cable Restriction Was Erroneous

The original purpose[6] of the LMDS/cable eligibility rule was to prevent incumbent cable television companies from acquiring A block spectrum as a means of blocking new competition from potential multichannel video distributors ("MVPD") using LMDS spectrum.[7] In adopting the restriction, the Commission recognized that cable operators might develop LMDS into a potential significant source of competition to LEC services, nevertheless, a "*short term*" eligibility restriction was imposed on the cable industry in the hope that it would stimulate MVPD competition.[8]

The temporary eligibility restriction was adopted in March 1997 at a time when it appeared to the Commission that a primary use of LMDS spectrum would be competitive MVPD services.[9] However, by the time of the LMDS auction in 1998, the market had changed significantly -- Cellularvision was in bankruptcy and did not even participate in the auction.[10] Although the LMDS market evolved away from multichannel video distribution purposes (despite the LMDS/cable eligibility restriction), LMDS suitability for data and

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5 As noted by the Commission in the NPRM, "[c]ompared to fiber, LMDS' lower cost and shorter deployment time make it an effective means of reaching the last mile. At the end of that last mile are likely to be small and medium-sized business." NPRM at ¶33.

6 It appears that the Commission is now contemplating a different rationale for extending the cable restriction based upon broadband competition. NPRM at ¶47. Such a rationale has no basis, as numerous FCC decisions and policy reports have found. *See* discussion infra at 6-9.

7 *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545, 12615 (¶159) (1997).

8 *Id.* at 12609 (¶148); 12615-12616 (¶159-60).

9 The eligibility restrictions were initially proposed in 1995. *Third Notice of Proposed Rulemaking*, 11 FCC Rcd. 53, 89-93 (¶¶ 97-108) (1995).

10 NPRM at ¶31. *See* Debra Wayne, *LMDS Players Make Upfront License Payments*, CINEWS (Feb. 18, 1998) <http://www.rcrnews.com/CGI-BIN/SM40i.exe> (visited January 21, 2000) (noting that a number of LMDS applicants, including Cellularvision, did not meet their up front payments because they could not raise sufficient capital).

associated telecommunications purposes is widely recognized. In fact, in November 1998, Cellularvision sold the bulk of its spectrum to WINSTAR, a wireless CLEC.[11] Today virtually all of the LMDS spectrum is licensed to entities with such data and telecommunications objectives; no LMDS spectrum is utilized for multichannel video distribution purposes to Hyperion's knowledge.[12]

Although the premise for the cable restriction was questionable at the outset, subsequent events have demonstrated that LMDS spectrum is not well suited for multichannel video programming distribution and that the premise was simply incorrect. All LMDS spectrum has already been auctioned by the FCC with the restriction in place, and it does not appear that video programming distribution is a use recognized by the market. Moreover, with all LMDS spectrum now auctioned, there is no plausible case that cable operators will attempt to acquire such spectrum from existing licensees to block development of a service that the market has already demonstrated does not exist.

It is likely that the actual impact of the cable restriction has been to severely slow the market deployment of this spectrum, and any extension of the restriction will only perpetuate and increase this harm. The experience of Hyperion and ABS is direct evidence of the harm that extension of the eligibility rule will cause. ABS is aggressively competing in the local exchange market and expanding its network nationwide. These companies need access to the A block in order to compete with ILECs and other CLECs on a level playing field, but could be prevented from doing so under this rule.[13] The result will be slower development of the spectrum and less competition benefiting consumers in the marketplace.

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11 NPRM at ¶31.

12 For example, the largest LMDS carrier with over 80 licenses serving a population of over 148 million persons is NextLink, a CLEC competitor to ABS. *See LMDS Auction Top 15 Spectrum Winners*, WIRELESSWEEK <http://www.wirelessweek.com/industry/lmdsup.htm> (visited Dec. 6, 1999).

13 In this regard, Hyperion has a waiver request pending at the FCC concerning two A block licenses subject to the eligibility restriction.

III. The Commission Should Revise The Standard For Sunsetting the Cable Restriction

The FCC should revise its current standard consistent with other similar wireless services. As suggested by Commissioner Powell the standard should require convincing evidence that lifting the cable television eligibility restriction poses a "significant likelihood of substantial competitive harm in [the video programming distribution market], and, if so, that an eligibility restriction is an effective way to address that harm."[14]

Under this standard the sunset cannot be extended. As previously noted, even with the restriction in place, no LMDS multichannel video distribution competitor emerged over the past several years from the spectrum auctions. In fact the only LMDS multichannel video distributor, Cellularvision, reorganized as a data services provider.[15] Moreover, the Commission's January 14, 2000 annual video programming report underscores the fact that numerous other MVPD competitors exist and are making steady and substantial inroads on cable in the marketplace.[16]

The Sixth Annual Report documents the continued steady decline of cable television's share of multichannel video subscribers. Cable's share of the market declined from 85 to 82 percent as Direct Broadcast Satellite ("DBS") subscribers grew by 39 percent between June 1998 and June 1999.[17] DBS now serves over 10.1 million subscribers and analysts expect that number will increase to 21 million by 2007.[18] With the recent passage the Satellite Home Viewer Act, local television signals are now available over DBS in a growing number of markets.[19] SHVA remedies the "primary disadvantage of DBS" reported by

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14 NPRM, Dissenting Statement of Commissioner Michael Powell at 7.

15 NPRM at ¶¶5-8, 70-73.

16 *See* Annual Assessment Of The Status Of Competition In Markets For The Delivery Of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, released January 14, 2000 ("Sixth Annual Report").

17 *Id.* ¶¶ 5, 70.

18 *Id.* ¶70.

19 *Id.* ¶ 74.

consumers compared to cable[20] and should further strengthen DBS subscribership relative to cable. Moreover, in addition to DBS, a number of other facilities based MVPDs compete in the market such as overbuilds by LECs (and other competitors like RCN), MMDS, SMATV and broadcast television operators.[21] The report also notes that important new competition could emerge from Internet video and electric and gas utilities.[22]

In response to this competition, cable operators are investing huge sums to rebuild their cable plant to provide improved video service as well as new voice and data services. Operators have increased such expenditures by 20 percent annually from 1995 to 1998.[23] In 1997 operators invested $3.7 billion, in 1998 $4.3 billion and in 1999 $7.2 billion, a 67 percent increase over 1998.[24] Given the enormous capital requirements needed to respond to real marketplace advances by DBS and other competitors, it is utterly implausible that cable operators would divert scarce funds to acquire LMDS spectrum in an effort to block a nonexistent and unlikely competitive threat.

IV. The Sunset Should Not Be Extended Based Upon Broadband Considerations

The NPRM inquires whether "broadband offerings by ILECs and incumbent cable operators justifies extension of the restriction to either ILECs or incumbent cable companies or both."[25] This is a solution in search of a problem.

It has long been a federal policy, now codified in Section 7 of the Communications Act, "to encourage the provision of new technologies and services to the public."[26] The federal government has done so by

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20 *Id.*

21 *Id.* ¶¶ 85-109.

22 *Id.* ¶¶ 110-116; 136-137. It is significant that even the FCC does not list LMDS as a potential MVPD in this report.

23 *Id.* ¶39.

24 *Id.*

25 NPRM at ¶46.

26 47 U.S.C. § 157(a).

allowing new technologies to grow in an unregulated environment. Congress has expressed a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[27] The Administration has adopted the same policy.[28]

In its February 2, 1999 Report to Congress, the FCC reported that the emergence of inter-modal, facilities-based competition for the delivery of Advanced Services was best served by cautious observation of these competitive battles, not by a premature regulation of specific competitors. The FCC formally concluded that the preconditions for monopoly (and government regulation) are not present.

> We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Today, no competitor had a large embedded base of paying residential consumers. The record does not indicate that the consumer market is inherently a natural monopoly. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio . . .. By the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market.[29]

Two recent FCC staff papers support this policy of "regulatory restraint." *Internet Over Cable* documented how well the FCC's policy of distinguishing competitive technologies from regulated transport services has spurred investment and deployment of competing facilities.[30] In October, 1999, *Broadband Today* reported the insignificant market share held by cable operators in Internet access[31] The Report

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27 47 U.S.C. § 230(b)(2).

28 *U.S. Government Working Group on Electronic Commerce, First Annual Report* (Nov. 30, 1998) ("*E-Commerce Report*") at 25 ("The Administration . . . support[s] open and vigorous competition as the principal means of developing [broadband] infrastructure . . . and seek[s] to encourage competition among various technologies and industry segments in the development and deployment of advanced services.").

29 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* Report, 14 FCC Rcd. 2398, ¶48 (rel. February 2, 1999).

30 Barbara Esbin, FCC Office of Plans and Policy, OPP Working Paper No. 30, *Internet Over Cable: Defining the Future in Terms of the Past* (Aug. 1998) (*"Internet Over Cable"*) at 63.

31 "[T]here are approximately 40 million residential Internet subscribers in North America, approximately one million of whom subscribe to broadband Internet services. It is important to remember that residential broadband Internet subscribers constitute less than 3% of the total Internet subscribers in North America. Although the Bureau expresses no view on whether

confirmed the continuing validity of "regulatory restraint to facilitate the rapid deployment of multiple broadband technologies, including cable, DSL, wireless and satellite."[32]

The Commission's Sixth Annual Report further verifies that the broadband market is in its early stage of development and should not be interfered with by unnecessary regulations. Although cable modems now serve more subscribers than alternative broadband technologies the lead is anything but insurmountable, and appears to be primarily in residential areas rather than business areas where LMDS would more likely be deployed. Cable modems serve approximately 1 million customers today (of 32 million passed homes) while DSL serves approximately 160,000 customers.[33] However, the Commission recognized the advantages that DSL has over cable technology (the ability to offer customers simultaneous, high speed Internet and voice or facsimile capabilities over a single telephone line, dedicated lines and security)[34] and the rollout of DSL and other technologies is accelerating. By the end of 1999 it is estimated that telephone company facilities will support approximately the same number of DSL homes (30 million) as cable Internet access capable homes.[35]

In addition to DSL, broadband Internet access is available by satellite (Hughes' DirectPC and EchoStar's OpenTV) and wireless licensees.[36] Finally, the FCC has recently announced auction schedules for 700 MHz and 39 GHz licenses that can provide broadband Internet access competitive

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the residential broadband market is a separate market from the residential narrowband market, a comparison of the numbers between the two is instructive to appreciate the relatively small scale of residential broadband deployment. Even the most optimistic estimates predict that narrowband will still be the dominant subscribed form of Internet access by 2005. One analyst predicted that by 2005, cable will have 34% (23 million subscribers) of the Internet access market, with DSL at 15% (10 million subscribers), and dial-up narrowband at 51%, or 35.7 million households." Deborah A. Lathen, FCC Cable Services Bureau, Staff Report, Broadband Today (Oct. 1999) (*"Broadband Today"*) at 32.

32 *Id.* at 43, 46.

33 Sixth Annual Report at ¶62.

34 *Id.*

35 *Id.*

36 *Id.* ¶ 89. Recent transactions give Sprint a potential two way wireless footprint of almost 30 million homes and MCI WorldComm about 50 million. Both entities intend to provide broadband Internet access over these systems.

with cable Internet access.[37] Other wireless technologies suitable for this purpose are also in the pipeline to be auctioned by the FCC in the near future.[38]

Obviously, it is too early to predict which broadband Internet access services will ultimately succeed. However, it is clear that it would be a mistake for the Commission to reverse its current policy favoring regulatory restraint with respect to the development of the broadband Internet access market. The Commission's own findings confirm that there is simply no basis for bootstrapping an extension of the LMDS/cable eligibility rule on concerns regarding cable's competitive position in the emerging broadband Internet access market.

For the foregoing reasons, Hyperion urges the Commission to allow the cable eligibility rule to sunset on June 30, 2000.

Respectfully submitted,

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January 21, 2000

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37 Significantly, the FCC did not impose any eligibility restriction on this spectrum although it is can be used to provide broadband Internet access service.

38 For example, the 24 GHz band will also be available for such uses in the future.